No. 22020

United States
COURT OF APPEALS
for the Ninth Circuit

BEATRICE M. MACOMBER,

Appellant.

vs.

JAMES BOSE and ETHYL JOYCE BOSE,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Montana.

No. 22020

United States

COURT OF APPEALS

for the Ninth Circuit

BEATRICE M. MACOMBER,

Appellant.

vs.

JAMES BOSE and ETHYL JOYCE BOSE,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court

for the District of Montana.

INDEX

	Page
Jurisdiction of the Courts	5
Statement of the Case	5
Specification of Error	7
Argument	7

Table of Cases

Bell v. Hood, 327 U. S. 678, 90 L. Ed. 939	14
Chicago, etc. R.R. Co. v. McGlinn	16
114 U. S. 542, 29L. Ed. 270	16
Clearfield Trust Co. v. U. S. 318 U. S. 363, 87 L. Ed. 838	17
Gully v. Bank, 299 U. S. 109, 81 L. Ed. 70	13
Halpert v. Udall, 231 Fed. Supp. 574	10
Lowe v. Manhattan Beach etc. Dist. 222 Fed. 2d 258	15
Mater v. Holley, 200 Fed. 2d, 123	11
Miller v. County of Los Angeles, 341 Fed. 2d 964	15
Petersen v. United States, 195 Fed. 2d 154	10
United States v. Walker River Irrig. Dist., 104 Fed. 2d 334	12
United States v. Warne, 190 Fed. Supp. 645	10
Winters v. U. S., 143 Fed. 741	11

Statutes

16 USC, Sec. 161	9
16 USC, Sec. 163	7
16 USC, Sec. 164	9
16 USC, Sec. 661	9
28 USC, Sec. 1291	5
28 USC, Sec. 1331	5
30 USC, Sec. 51	9
Sec. 83-102, Rev. Codes of Montana	8
Sec. 83-104, Rev. Codes of Montana	8
Chap. 29 of Title 89, Rev. Codes of Montana	6

JURISDICTION OF THE COURTS

The jurisdiction of the District Court is based upon 28 USC, Sec. 1331.

The jurisdiction of this Court of Appeals is based upon 28 USC, Sec. 1291, this being an appeal from a final judgment.

STATEMENT OF THE CASE

The parties own different tracts of land within Glacier National Park, deriving their respective ownerships from predecessors who homesteaded these lands prior to creation of Glacier Park in 1914. The action concerns a dispute over the rights to waters of a spring on a third tract of land, owned by the United States of America.

The appellant is the successor to her mother, Lydia Comeau, in ownership of her tract. In 1936, Lydia Comeau owned other lands in Glacier Park as well, and at that time she conveyed to the United States Lot 3 of Section, Township 33 North, Range 18 West. In the deed, it was agreed between her and the United States that she should have all water rights in the spring on Lot 3, including the right to place a dam or tank in the spring to store water, and a right of way for a pipe line to carry water to the tract now owned by Appellant. It was further agreed that the water right so provided should pertain only to the

This suit is the result.

We are now considering the appeal from an order of the lower Court dismissing the Complaint on the ground of lack of jurisdiction.

ARGUMENT

There is no diversity of citizenship. The alleged value of the water rights in excess of $10,000.00 is open to question, nothing appearing beyond the bare statement. The rights of both parties originated prior to the creation of Glacier National Park, under Montana law, and the creation of the Park as a separate entity had no effect, adverse or otherwise, upon them. This was the reasoning upon which the dismissal order of the lower Court was based, and soundly and properly so. 16 U. S. C. Sec. 161: "Nothing herein contained shall affect any valid claim, location or entry existing under the land laws of the United States before May 11, 1910, or the rights of any such claimant, locator or entryman to the full use and enjoyment of his land."

The cases cited by appellant in her brief all appear to do with events and circumstances which arose following the acquisition of territorial jurisdiction by the United States, and involving a Federal question.

Opposed to this view are:

Mater v. Holley, 200 Fed. 2nd 123, and cases cited therein

C. R. I. & P. Ry. v. McGlinn, 114 U. S. 542

Jas. Stewart & Co. v. Sadrakula, 309 U. S. 94

Misner v. Cleveland Wrecking Co., 25 Fed. Supp. 763

In the C.R.I. & P. Ry. case cited above, the Court "declared the rule to be that when legislative power over territory is transferred from one sovereign to another, the then existing laws of the surrendering sovereign for the protection of private rights, so far as consistent with the laws of the new sovereign, continue in force until abrogated or altered by the new sovereign. This principle was there held applicable to the cession by a state to the United States of land for a military reservation such as is here involved. This assures that no area, however small, will be left without laws regulating private rights."

Where diversity of citizenship does not exist, jurisdiction of the district court can be sustained only on the ground that the case arises under the Constitution or laws of the United States; otherwise the bill must be dismissed. Gustafson v. California Trust Co., 73 Fed. 2nd 765. In that case a cancellation of a contract for deed was sought, the land lying in the public domain of the United States. This alone was not sufficient to sustain federal court jurisdiction.

In Shoshone Mining Co. v. Rutter, 177 U. S. 505, 507, an adverse mining claim in federal court was dismissed in favor of an adverse decision on the same

state of facts in a state court. In the language of the court: This case "does not really and substantially involve a dispute or controversy respecting the validity, construction or effect of a federal law."

Federal Courts generally were admonished in Poindexter v. Board of Supervisors, 177 Fed. Supp. 852 that they should be zealous to avoid expansion of federal jurisdiction and should scrutinize carefully the pleadings and facts before assuming jurisdiction on the ground of an alleged federal question being involved.

To the same purport is the decision in Tsang v. Kansas, 173 Fed. 2nd 204, where the court dismissed a suit brought by an employe against his employer for Veterans benefits, after he had lost a suit on the same facts in the state court.

In Brown v. City of Wisner, La., 122 Fed. Supp. 736, the court held that an incidental federal question is not an adequate basis on which federal jurisdiction may attach.

Still another decision to the same effect is Central Ill. Pub. Service Co. v. City of Bushnell, 109 Fed. 2nd 26, where a municipality proposed to erect a rival power plant with a grant of money under the Federal National Recovery Act, and the plaintiff sought to enjoin it. Said the court, dismissing the complaint at

p. 31: "The issue presented is strictly one involving a local question. In the absence of a substantial federal question . . . . . the federal courts are neither required to consider local causes of action nor are they allowed to do so."

CONCLUSION

The appellees submit that this suit was improperly brought in the district court. There is no diversity of citizenship. No Federal or constitutional question is raised. No reason is advanced nor does any appear why resort was not first had to the state courts. The controversy is strictly local, between neighboring landowners, and the mere fact its situs is in a national park does not create federal jurisdiction.

The appeal herein should be dismissed.

Respectfully submitted,
HAROLD F. SMITH
Attorney for Appellees

HAROLD F. SMITH
Office and P. O. Address
P. O. Box 731
Kalispell, Montana 59901

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Cir-

cuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD F. SMITH
Attorney for Appellees

IT IS HEREBY CERTIFIED that copies of this brief have been served upon James A. Cumming, Counsel for the Appellant, this 12th day of September 1967.

HAROLD F. SMITH
Attorney for Appellees